FOR ARGUMENT

Nos. 86-179 and 86-401

Supreme Court, U.S.
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# In the Supreme Court of the United States

OCTOBER TERM, 1986

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CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER DAY SAINTS, ET AL., APPELLANTS

*v.*

CHRISTINE J. AMOS, ET AL.

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UNITED STATES OF AMERICA, APPELLANT

*v.*

CHRISTINE J. AMOS, ET AL.

---

*ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH*

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## REPLY BRIEF FOR THE UNITED STATES

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*ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH*

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**REPLY BRIEF FOR THE UNITED STATES**

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In 1972, Congress enacted Section 702 of the Civil Rights Act of 1964, 42 U.S.C. 2000e-1, exempting religious organizations from Title VII's prohibition against discrimination in employment on the basis of religion. It thus determined that government regulation of the religion-based employment decisions of religious organizations was not a necessary element of its program for combatting religious discrimination in employment. Nothing in the Religion Clauses of the First Amendment, which have as their essential purpose the disassociation of government from religion, supports the startling proposition advanced by appellees in their answering brief—that the exemption contained in Section 702 is invalid because

the Constitution requires Congress to subject the employment practices of religious organizations to government regulation. Instead, as we demonstrated in our opening brief, the Constitution grants Congress the authority to avoid potential entanglement between government and religion by exempting religious organizations from government regulation. Section 702 constitutes such a permissible accommodation to religion and therefore does not violate the Establishment Clause.[1]

1. Appellees first contend that Section 702 cannot be justified as an accommodation of religion. Their principal argument in support of that contention (Br. 14-21) is that the Free Exercise Clause did not compel the adoption of Section 702. This Court has made clear, however, that "[t]he limits of permissible state accommodation to religion are by no means coextensive with the noninterference mandated by the Free Exercise Clause." *Walz* v. *Tax Comm'n*, 397 U.S. 664, 673 (1970); see also *Hobbie* v. *Unemployment Appeals Comm'n*, No. 85-993 (Feb. 25, 1987), slip op. 8; U.S. Br. 22. Even if the exemption contained in Section 702 is not mandated by the Free Exercise Clause, therefore, Congress still has authority to adopt the exemption as a permissive accommodation of religion.

Appellees next argue (Br. 22-25) that Congress's authority to enact permissive accommodations of religion by exempting religious organizations from generally applicable government regulations is very narrow, and assert that Section 702 exceeds the limits of that authority. As we explained in our opening brief (at 18-31), government acts to accommodate religion when it exempts religious orga-

[1] Amici AFL-CIO et al. assert (Br. 2-5) that Section 702 is most clearly invalid in exempting the profit-making activities of religious organizations. That question regarding the scope of Section 702 is not presented in this case, however, because the Deseret Gymnasium – the activity in which appellee Mayson was employed – is not a profit-making activity; it is subsidized by the Mormon Church (see U.S. Br. 3-4).

nizations from regulations that may hinder those organizations in the performance of their religious missions. Religious institutions have an interest in defining the limits of religious life and community, and government has a corresponding interest in not entangling itself unnecessarily in the internal affairs of such institutions. Indeed, the nonintervention of government in religion fosters religious diversity and pluralism, facilitating "a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff* v. *Saint Nicholas Cathedral*, 344 U.S. 94, 116 (1952); see also *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696 (1976).

Government interference with religious autonomy may involve outright coercion, forcing a religious organization to act in a manner that the organization believes to be inconsistent with religious teachings, or may take the more subtle form of inquiry into—and oversight of—religious activities, implicating the concerns about entanglement of government and religion that underlie the Establishment Clause.[2] This Court has recognized both of these effects

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[2] Appellees' claim (Br. 22) that such a regulatory burden can never implicate the Establishment Clause is simply wrong. This Court has recognized that government investigation into religious organizations may lead to undesirable entanglement between government and religion. For example, in *Larson* v. *Valente*, 456 U.S. 228 (1982), the Court invalidated a state statute requiring religious organizations that received more than fifty percent of their contributions from nonmembers to register under state laws regulating charitable solicitations. In discussing the entangling aspects of the statutory scheme, the Court observed that "[t]he registration statement * * * calls for the provision of a substantial amount of information, much of which penetrates deeply into the internal affairs of the registering organization." 456 U.S. at 253 n.29; accord, *Walz* v. *Tax Comm'n*, 397 U.S. at

in approving exemptions for religious organizations from generally applicable regulatory programs. See, *e.g.*, *NLRB* v. *Catholic Bishop*, 440 U.S. 490, 501-504 (1979); cf. *Larson* v. *Valente*, 456 U.S. 228, 252-255 (1982).

The exemption contained in Section 702 plainly protects against government intrusion into decisions related, in the minds of believers, to questions of faith. The amicus briefs filed in this Court by a broad spectrum of religious groups discuss the reasons—rooted in religious belief and practice—that religious organizations must in some circumstances take religion into account in employment decisions. See *e.g.*, Christian Legal Society Br. 5-18; Baptist Joint Comm. on Public Affairs Br. 28-32; American Jewish Congress Br. 25-32; United States Catholic Conference Br. 1-3; General Conference of Seventh Day Adventists Br. 6-8; American Ass'n of Presidents of Independent Colleges and Universities et al. Br. 11-13; National Jewish Comm'n on Law and Public Affairs Br. 7-8. Indeed, the private appellants argue (Br. 17-23) that the Free Exercise Clause insulates the employment decision challenged in this case from government regulation.

Whether or not the arguments advanced by appellants and amici are sufficient to mandate an exemption under the Free Exercise Clause is beside the point. What these arguments demonstrate is that free exercise values are implicated by government regulation of employment decisions based upon religion and that Congress acted reasonably in enacting Section 702 to eliminate potential government infringement of religious autonomy. In addition, Section 702 serves the values embodied in both the Free Exercise and Establishment Clauses by eliminating

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674-676 (in approving a tax exemption for religious property, the Court noted that the exemption would lessen entanglement because it would reduce the occasions for government review of church financial and administrative practices); see also *Gillette* v. *United States*, 401 U.S. 437, 457-458 (1971).

any need for the government investigation of religious activities that would otherwise be necessary to resolve claims that government regulation violated the Free Exercise Clause.[3]

Appellees assert that the prior version of Section 702, which exempted only the "religious" activities of religious institutions from the prohibition against religious discrimination, "provided more than sufficient accommo-

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[3] The Court need not address the merits of the private appellants' free exercise claim because Section 702 renders that inquiry unnecessary. Indeed, as we have discussed, Section 702 was adopted in order to eliminate the need for courts to undertake such inquiries.

Some of the amici supporting appellees argue that Section 702 does not promote free exercise values because religious beliefs or practices do not necessarily require religious organizations to take religion into account in their employment decisions. See AFL-CIO Br. 13-15; Employment Law Center Br. 23-27. That argument suffers from two basic flaws. First, this Court never has indicated that Congress's authority to accommodate religion is restricted to circumstances in which government regulation directly affects religious beliefs and practices. Indeed, in *Walz* v. *Tax Comm'n, supra,* the Court upheld a property tax exemption for religious organizations without first making the (quite unlikely) finding that the tax directly burdened religious beliefs or practices.

Second, as the private appellants and other religious organizations have discussed, religious beliefs may require that hiring be conducted on religious grounds. (Even the AFL-CIO acknowledges this fact (see Br. 15-16).) Congress could reasonably conclude that a general exemption was justified in order to avoid imposing a burden in those circumstances in which religious beliefs require religion-based hiring. As this Court has noted, such 'uniform application of [government regulation] to all religiously operated [activities] *avoids* the necessity for potentially entangling inquiry" (*Bob Jones University* v. *United States,* 461 U.S. 574, 604-605 n.30 (1983), (citation omitted; emphasis in original)). Specifically, such a general rule of exemption both avoids the awkward result of treating some religious organizations differently than others because of a difference in religious beliefs with respect to the employment of non-members, and the necessity of an offensive case-by-case investigation into the nature and sincerity of particular religious beliefs and practices.

dation of the legitimate interests of religious organizations" (Br. 24). But appellees do not explain why their bare assertion that this is so should displace Congress's considered judgment that a broader exemption is appropriate. Indeed, it seems clear that some government interference with religion would persist under the standard suggested by appellees. First, a constricted exemption might force religious organizations, such as the Mormon Church in this case, to alter their employment practices in a manner inconsistent with their beliefs. Second, the limited exemption would mandate—in every case—an inquiry into the beliefs, finances, and administration of the religious organization in order to determine whether a particular activity is "religious." The three-part inquiry devised by the district court (see J.S. App. 10a-17a) graphically demonstrates the entangling nature of the determination that would be committed to the courts and the Equal Employment Opportunity Commission by such a standard.[4]

In sum, by exempting religious organizations from the prohibition against religious discrimination in employment, Section 702 plainly "lifts a government-imposed burden on the free exercise of religion" (*Wallace* v. *Jaffree*, 472 U.S. 38, 83 (1985) (O'Connor, J., concurring in

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[4] Appellees discuss in great detail (Br. 16-21) a variety of situations in which exemptions from government regulation are limited to a religious organization's religious activities. But the fact that Congress has created a narrower exemption, or no exemption at all, in some circumstances does not disable it from creating a broader exemption here. And the fact that in some circumstances the courts are required to distinguish between the religious and secular activities of a religious organization does not mean that such inquiries do not implicate the values underlying the Religion Clauses. After weighing the government interests underlying the prohibition against religious discrimination, Congress reasonably determined that potential collisions between government and religion could be avoided by adopting a broad exemption here. That determination sharply distinguishes the present case from the other situations cited by appellees.

the judgment)). It indisputably qualifies as a measure designed to accommodate religion.[5]

2. Appellees take issue with our showing (U.S. Br. 31-39) that Section 702 does not have any effect that the Court has identified as impermissible under the Establishment Clause. We discuss each of their contentions in turn.

a. Appellees' principal claim is that Section 702 has the effect of advancing religion in violation of the First Amendment because it "permits religious employers to advance religion by coercing religious loyalty from secular employees through economic power" (Br. 25). Appellees err fundamentally in attributing to the government the consequences of the voluntary choices of private religious organizations to take religion into account in their hiring decisions.

The First Amendment bars government from influencing an individual's personal religious choice. Section 702 plainly does not constitute such impermissible government influence. It does not say anything about what an individual should or should not believe, and it does not put the force of government authority behind religion in general or any religious belief in particular. The government simply has left religious organizations free to act as they desire. Effects caused by the actions of religious organizations in exercising that free choice are not relevant

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[5] Appellees argue (Br. 22) that if Section 702 constitutes an accommodation of religion, any exemption whatever for religious organizations will fall into that category. What appellees ignore is that such exemptions are not automatic; they must be adopted by the political Branches, which are not likely to act in a manner that could lead to injury to the public at large. (The absence of the broad range of exemptions hypothesized by appellees indicates that appellees' fears are quite unfounded.) In addition, an exemption would not automatically be upheld as an accommodation of religion by the courts; the inquiry would be whether the political Branches could reasonably determine that the exemption promotes the values embodied in the Religion Clauses.

in assessing the validity of government action under the Establishment Clause. Cf. *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972).[6]

The gist of appellees' argument, therefore, is that government impermissibly affects an individual's religious choice when it fails to eliminate private influences upon that choice. In appellees' view, government has an absolute, affirmative obligation to prohibit religious discrimination by religious organizations. But the First Amendment hardly imposes such a nondiscrimination

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[6] Appellees argue that the absence of government action is irrelevant, relying (Br. 26 n.26) upon this Court's observation that "[t]he Establishment Clause * * * does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not" (*Engel* v. *Vitale*, 370 U.S. 421, 430 (1962)). But the Court made that statement in the course of evaluating *government* action directed against individuals. The statement reflects the conclusion that government action short of direct coercion—such as endorsement by government of a particular religious message—may amount to an exercise of government authority that violates the Establishment Clause. The Court did not endorse the sweeping proposition advanced by appellees—that entirely private conduct that impacts upon an individual's religious choice must be treated as the equivalent of government action. Unlike the statute in *Engel*, which prescribed the text of a prayer to be recited each day in public schools, Section 702 cannot be viewed as establishing a religion, but instead represents government's decision to separate itself from religion.

This analysis is not altered by the Court's rejection of the free exercise claim in *United States* v. *Lee*, 455 U.S. 252 (1982). The Court observed in that case that "[g]ranting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees" (455 U.S. at 261). But the Court simply found that the Constitution did not compel an exemption from the statutory scheme; it did not indicate in any way that such an exemption would have been barred by the Establishment Clause or that its observation even would be relevant to the analysis under the Establishment Clause.

mandate on private religious organizations. To do so, of course, would turn the meaning of the First Amendment on its head by depriving such organizations of their liberty to define their own religious missions. The flaw in appellees' reasoning is demonstrated by the implicit suggestion that Congress would be constitutionally obliged to prohibit religious discrimination by religious organizations, even if it did not extend a similar prohibition to secular employees.[7] Of course, prior to 1964 all private employers, including religious employers, were free to consider religion in connection with their employment decisions, and, quite reasonably, no one thought to suggest that such inaction constituted an establishment of religion.[8]

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[7] This conclusion follows unless the asserted impermissibility of Section 702 flows from the distinction in treatment of religious and non-religious employers, thus giving a special significance to the government's inaction vis-a-vis religious employers. As a matter of symbolism, we showed in our opening brief (at 33-34) that Section 702, like the exemptions required by the Free Exercise Clause, conveys the message of noninterference of government in religion that is at the heart of the Religion Clauses. Likewise, as a matter of equal protection analysis, no serious issue is presented. See pages 12-13, *infra*.

[8] Appellees' reliance (Br. 27-29) on *Estate of Thornton* v. *Caldor, Inc.*, 472 U.S. 703 (1985), is entirely misplaced. The statute at issue in *Thornton* provided employees with an absolute right not to work on their Sabbath. This Court found that the statute violated the Establishment Clause because it endorsed a particular religious belief—Sabbath observance—at the expense of all other interests and because the state coerced private employers to accommodate the religious beliefs of their employees. See *Hobbie* v. *Unemployment Appeals Comm'n*, slip op. 9 n.11 (characterizing *Thornton* as resting on the determination that the state statute "placed an unacceptable burden on employers and co-workers because it provided no exceptions for special circumstances regardless of the hardship resulting from the mandatory accommodation"). The impermissible effect of the statute in *Thornton* thus was the *government* coercion directed against employers and employees. Here, by contrast, the government

b. Appellees argue (Br. 37-38) that the exemption contained in Section 702 is not supported by historical tradition and therefore is not permissible under the Establishment Clause. Of course, prior to 1964 there was *no* government regulation of private employment decisions and religious organizations were free, as now, to take religion into account in their employment decisions. Since 1964, for all but the eight years between 1964 and 1972, federal law has recognized such an exemption, and approximately half of the states have adopted statutory exemptions providing religious organizations with protection similar to or greater than Section 702.[9] These state statutes, all of which would be invalid under appellees' theory of the First Amendment, confirm the strong tradition supporting the broad exemption contained in Section 702.

c. Appellees argue (Br. 29-31, 34-37) that Section 702 violates the Establishment Clause because it gives

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has chosen *not* to engage in coercion, remaining neutral in matters of religion and employment. The Establishment Clause therefore is not implicated. See U.S. Br. 37 n.20.

[9] See Alaska Stat. § 18.80.300(4) (1986); Ariz. Rev. Stat. Ann. § 41-1462 (1985); Cal. Gov't Code § 12926(c) (West 1980 & Supp. 1987); Colo. Rev. Stat. § 24-34-401(3) (1982); Del. Code Ann. tit. 19, § 710(2) (1985); D.C. Code Ann. § 1-2503(b) (1981); Haw. Rev. Stat. § 378-3(5) (1985); Ill. Rev. Stat. ch. 68, para. 2-101(B)(2) (Supp. 1986); Ind. Code Ann. § 22-9-1-3(h) (Burns 1986); Kan. Stat. Ann. § 44-1002(b) (1981); La. Rev. Stat. Ann. § 23:1006(A)(2) (West 1985); Me. Rev. Stat. Ann. tit. 5, § 4553(4) (1979); Mass. Ann. Laws ch. 151B, § 4(15) (Law. Co-op. 1976); Mo. Ann. Stat. § 213.010(5) (Vernon Supp. 1987); Mont. Code Ann. § 49-2-101(8) (1985); N.H. Rev. Stat. Ann. § 354-A:8(IV) (1984); N.J. Rev. Stat. § 10:5-12(a) (Supp. 1986); N.M. Stat. Ann. § 28-1-9(B) (1983); N.Y. Exec. Law § 296(11) (McKinney 1982 & Supp. 1986); Pa. Stat. Ann. tit. 43, § 954(b) (Purdon Supp. 1986); R.I. Gen. Laws § 28-5-6 (1986); S.C. Code Ann. § 1-13-80(h)(5) (Law. Co-op. 1986); Utah Code Ann. § 34-35-2(5) (1974 & Supp. 1986); Wash. Rev. Code Ann. § 49.60.040 (1962 & Supp. 1986); Wyo. Stat. § 27-9-102(b) (1977). Several states have not enacted prohibitions against religious discrimination by private employers.

businesses owned by religious organizations a competitive advantage over other businesses. As a threshold matter, it is not clear that the existence of such an incidental benefit would be relevant under the Establishment Clause. See U.S. Br. 35-36. In any event, there is no support for appellees' claim here.

Appellees base their argument entirely on the tithing requirement that is an element of the Mormon Church's religious tenets (see U.S. Br. 5). But, as we noted in our opening brief (at 34-35 n.18), the district court did not rely on the tithing requirement in holding that Section 702 impermissibly advanced religion. The district court did not make any findings regarding tithing and its effect on the competitive position of businesses owned by the Church, and there is no evidence in the record from which the district court could have made such findings. Indeed, there is nothing to support this argument aside from appellees' rhetoric.[10] Moreover, nothing in the record supports appellees' somewhat extravagant claims (Br. 36) regarding the effect of Section 702 upon the Church's overall financial structure. It is difficult to believe that Section 702 is the key to the Church's ability to establish a global financial empire; in the absence of any evidentiary support that contention must be rejected.

More importantly, however, the constitutionality of Section 702 cannot depend on the practices of a particular religious group. The district court did not restrict its holding of unconstitutionality to businesses owned by the Mormon Church, but held Section 702 unconstitutional insofar as it exempted the secular activities of *any* religious organization, regardless of its beliefs or practices. The correctness of that ruling cannot turn upon an intrusive

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[10] It therefore is not clear whether any such competitive advantage actually exists or whether, for example, the narrowing of the Church's labor pool that results from the Church's employment policy actually increases its labor costs.

analysis of the myriad beliefs and practices of religious employers throughout the nation. Such inquiry, offensive in itself, would result in uneven application of constitutional requirements and lead to differing legal obligations among religions, thus implicating the Establishment Clause's requirement of government neutrality among religions.

3. Appellees invoke equal protection principles in support of their challenge to Section 702 (Br. 33-34), contending that the provision is unconstitutional because it distinguishes between employees of religious and secular employers, as well as between religious and secular employers themselves. Section 702 certainly does contain these distinctions, but it just as clearly is not invalid under equal protection principles.[11]

Appellees' basic error is their assumption that the distinctions drawn by Section 702 must be evaluated under the "strict scrutiny" standard. This Court has only subjected government action that draws distinctions *among* religions to heightened scrutiny under the Equal Protection Clause; it has indicated that a classification distinguishing between religion and non-religion should be evaluated under the Establishment Clause (*Larson* v. *Valente*, 456 U.S. at 246, 252). If such a statute passes muster under the Establishment Clause, there plainly is no need to subject it to heightened equal protection scrutiny. The concerns that might justify such heightened scrutiny—such as, for example, the danger of government aid to or endorsement of religion—are addressed in the Establishment Clause analysis, and any statute that passes

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[11] Appellees assert (Br. 33 n.35) that Section 702 discriminates among religions, but that claim rests upon appellees' theory that the statute may in the future be construed to exclude certain religious groups. There is no reason to believe that the courts will construe the statute in a discriminatory manner, and such a questionable assumption certainly should not be the basis for determining the constitutionality of the statute in a case where that issue is not even presented.

that analysis will not burden a fundamental constitutional right. All that equal protection requires in that context is minimum rationality. See *Lyng* v. *Castillo,* No. 85-250 (June 27, 1986), slip op. 3-4. Here, Congress has enacted an accommodation of religion that rationally advances constitutionally sanctioned goals in a manner consistent with the Establishment Clause. There is no equal protection violation.

For the foregoing reasons, and the reasons stated in our opening brief, the judgment of the district court should be reversed.

Respectfully submitted.

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